[REPORTED]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 694 OF 1999.

1. Navnath Namdeo Maske aged adult, resident of Khairewadi, Taluka Madha District Solapur 2. Kerba Chandrabhan Gore, aged adult, resident of Taluka Madha, Dist.Solapur	] Appellants (Original Accused Nos. 2 and 3)
versus.	
The State of Maharashtra	] Respondent.

WITH

CRIMINAL APPEAL NO.690 OF 1999

Dattatraya Pandharinath Gaikwad aged adult, resident of Londhewadi, Taluka Madha Dist. Solapur	] Appellant (Org.Accused No.1)
versus	
The State of Maharashtra	] Respondent.

Mr.Ramrao Adik, Sr.counsel, i/by Mr.M.A.Choudhari for Accused No.2;
Mr.Hudlikar, Sr.counsel, for Accused No.3.
Mr.Thorat, Sr. counsel, for Accused No.1.
Mr.D.R.More, APP, for the State.

CORAM : D.G.DESHPANDE,J.

DATED : 18th August 2004.

JUDGMENT :

1. There were in all three accused in a case of gang rape who have been convicted by the trial Court. Appeal No.694 of 1999 is filed by original Accused Nos. 2 and 3 and Appeal No.690 of 1999 is filed by original Accused No.1.

2. Mr.Ramrao Adik, counsel, appearing for Accused No.2; Mr.Hudlikar, counsel, appearing for Accused No.3 and Mr.Thorat, counsel, appearing for Accused No.1. Even though Appeal No.694 of 1999 is filed by two accused, I permitted both Mr.Adik and Mr.Hudlikar to make their submissions separately in respect of each accused and so also I heard Mr.Thorat. Mr.More,

the learned APP, appearing for the State, gave replies to all the submissions.

3. All the three accused have been convicted by the II Addl.Session Judge, Solapur by his judgment dated 26.11.1999. Accused No.1 Dattatray Gaikwad is convicted under Section 363 of the Indian Penal Code and sentenced to suffer R.I. for three years and to pay a fine of Rs.1000/-, in default, R.I. for 9 months.

4. Accused Nos. 2 and 3 are convicted under Section 376 (2)(g) of the Indian Penal Code and sentenced to suffer R.I. for seven years and to pay a fine of Rs.3,000/- each, in default R.I. for two years and two months. Further accused Nos. 2 and 3 are convicted under Section 506(2) of the Indian Penal Code and directed to undergo simple imprisonment till rising of the court and to pay a fine of Rs.500/- each, in default R.I. for one month.

5. Accused No.3 has been enlarged on bail by Justice Vishnu Sahai on 25th July 2000 and the prayers for bail of other accused Nos. 1 and 2 were rejected even subsequently.

6. The name of victim in this case is Shobha Bhagwan Jadhav. She was 18 years of her age. According to prosecution, Shobha and her friend Manisha (PW 7) wanted to go in further education at Kurdwadi. Both of them left their houses at Khairewadi at about morning time and came to Madha town by S.T. bus from where they were to obtain their photographs for their identity card and where they were to know whether they have been admitted in Girls Hostel at Kurdwadi. They reached at Madha town and went to photo studio; got themselves photograph from Sunil Salgar. They got the information that they have been admitted in the Girls highschool at Kurdwadi. They, therefore, came to S.T. bus stand at Madha some time about 2.30 p.m. Manisha, the friend of Shobha, informed Shobha that she wanted to see her guest, therefore, she left the company of Shobha. Shobha was waiting at the bus stop. At that time it is alleged that accused No.1 came there. He was known to Shobha. He told Shobha that her father Bhagwan had come to Madha and was at Visawa Guest House which was situated nearby the S.T. stand and he wanted to see Shobha at the said guest house. Shobha believed the representation made by accused Dattatraya and

went with him to Visawa Guest House to see her father.

7. According to the prosecution, accused Nos. 2 and 3 were already there. When Shobha reached, she found that her father had not come to Visawa Guest House. She was frightened and decided to leave the guest house and she tried to escape, but she was caught by accused No.1 with the help of other accused and forced into Room No.4. She tried to raised hue and cry. Accused threatened her and directed her not to raise hue and cry. Thereafter accused No.2 closed the door of the room from inside and committed rape upon her. Thereafter accused No.3 came and he also raped Shobha. Accused No.1 thereafter committed rape upon Shobha as per the supplementary statement of Shobha. Therefore, according to the prosecution all the three accused raped Shobha between 2.30 p.m. to 3.30 p.m. on 11.6.1995.

8. Thereafter Shobha came to the bus stand. She got the bus in the evening and came to Khairewadi. Her father came to her house at about 12.00 midnight and she disclosed the

incident to him. On the next date i.e. on 12.6.1995 they went to advocate Desai at Madha for his opinion. And then a complaint came to be lodged in the Madha Police Station. Investigation was carried out and the accused came to be prosecuted and convicted as stated above.

9. In the trial Court the prosecution examined as many as 18 witnesses. However, excepting Shobha and her father Bhagwan other witnesses turned hostile even including Shobha's friend Manisha. Even advocate Desai who was examined by the prosecution was declared hostile. Witnesses from the guest house were also turned hostile. Therefore, this is a case based on solitary testimony of Shobha supported by the evidence of her father, I.O. and police officers and report of the C.A. The trial Court did not convict accused No.1 for the offence under Section 376 of the Indian Penal Code and it is only accused Nos. 2 and 3 who were convicted.

10. All the three advocates representing three accused attacked the entire prosecution case on different grounds. The most important

ground amongst them is that even if conviction in a rape case is based on solitary testimony of prosecutrix, Shobha's testimony does not inspire confidence. It is full of lapses and lacunas, and therefore, her evidence was liable to be rejected. Secondly, there was inordinate and unexplained delay in lodging the FIR. Thirdly, even if the FIR is lodged and certain sequence of events was given by Shobha in the FIR dated 12.6.1995 she completely resiled from that statement when her supplementary statement came to be recorded few hours thereafter.

11. It was further contended on behalf of the accused that when Shobha left her house and her village Khairewaid and came to Madha she knew that her father was at Khairewadi. Therefore, there was no question of accused inducing her to go to that Visawa Guest House on the pretext that her father had come to that guest house. Shobha was about 17 years of age at that time and she should have tried to find out why the father had come to Madha; why he was staying at Visawa Guest House and why he did not come directly to see Shobha because her father was knowing for what purpose Shobha had come to Madha. Further

according to the accused, the testimony of Shobha, given in Court, and the FIR and the supplementary statement create totally different picture which is contradictory to the first statement. According to the accused, even if Shobha was examined by the doctor on the night of 13.6.95 there were no signs of rape on the private parts or even on her body, nor found any injury on her body and, the second page of the certificate of the doctor was totally blank, no abnormalities were detected. Advocates for the accused argued that if the rape was committed upon Shobha forcibly by the accused, then there should have been some sort of injuries on the person of Shobha while she resisted and some sort of injuries on the person of any of the accused when they committed rape. But neither there was any injury on the person of Shobha nor there was any injury on the body of any of the accused. Therefore, according to them the testimony of Shobha did not at all inspire confidence and the accused are entitled for acquittal.

12. As against this Mr.More, the learned APP appearing for the State, contended that firstly

Shobha had no reasons to falsely implicate the accused in such a heinous crime. Secondly, the testimony of Shobha was corroborated by the evidence of her father. Thirdly, the bed sheet in Room No.4 of the said guest house, the clothes of Shobha and the clothes of accused are supported the case of the prosecution from the report of C.A. Then according to Mr.More, there was no delay in lodging the FIR and since explanation about the so called delay was given, the delay could not be considered as fatal. Regarding contradictions in the FIR and the supplementary statement, Mr.More contended that looking to the mental condition of Shobha at the relevant time, those contradictions were liable to be disregarded as they were not material. Mr.More also pointed out that the prosecution has tendered the evidence on record to show that these accused were staying in the Visawa Guest House at the relevant time and this was brought on record from the documents recovered and seized from the said Visawa Guest House. Therefore, according to More, the conviction of accused Nos. 2 and 3 for the offence under Section 376 (2)(g) of the Indian Penal Code was justified.

13. Whole case centres around the evidence of Shobha, her FIR and her supplementary statement. The FIR is produced and proved on record by Shobha. It is at Exhibit 21. Her subsequent statement or further statement is at Exhibit 49. The story given in the FIR (Exhibit 21) is that upon representation made by accused Dattatray, Shobha went to Visawa Guest House where she saw accused Nos. 2 and 3. Then Navnath pushed her in the room. He also entered the room; closed the door from inside and committed rape. This took place between 3 p.m. to 3.25 p.m. She has not made any allegation of rape against either accused Dattatraya or accused Keraba. She has stated that while the rape was being committed by accused No.2 Navnath, somebody was banging the door from outside and asked the door to be opened. Then Navnath opened the door; she put on her Nicker and outside the room accused Dattatraya and two unknown persons were there. Thereafter Navnath threatened her not to make any complaint to anybody.

14. It will be clear from the aforesaid FIR that when the FIR was lodged on the next day i.e.

on 12.6.1995 at 3.15 hours, after narrating the entire incident to her father in the night and after consulting advocate Desai in the Morning, Shobha did not make any allegation of rape against accused Nos. 3. She also did not mention that he was present in the Visawa Guest House. She does not say that she saw him at any time from her entry in the Visawa Guest House till she left the Visawa Guest House after rape and went to the S.T. stand.

15. As against this, in the supplementary statement (Exhibit 49) Shobha had given total go bye to this story and stated that Dattu Gaikwad levered her from bus stand and took her to Visawa Guest house and from the stairs of the lodge she had taken to Room No.4. There she saw Navnath Accused No.2 of Gorewadi and Kerbha of Gotewaid i.e. Accused No.3. She asked Navnath as to where her father was. Navnath did not say anything; pushed her inside the room and went out. Then accused No.3 Keraba entered the room; bolted it from inside and then he committed rape. After that Navnath came and he committed rape and, thereafter Dattu came in the room and he committed rape.

16. It will be clear at this stage that Shobha has completely and totally changed her version in the supplementary statement. In the FIR she makes the allegations of rape only against accused Navnath. In the supplementary statement she brings into picture accused Nos.1 and 3 and alleges that they had committed rape. In the supplementary statement (Exhibit 49) in last para she had tried to explain that when she lodged the FIR she was not in a proper state of mind and had lost control over her mind, and therefore, she had not named Keraba as a person who committed rape first in order of sequence. When, therefore, the prosecutrix changes her version completely and totally within few hours of lodging the FIR and tries to implicate accused Nos. 1 and 3, then this become a strong circumstance creates serious doubt of her character and integrity as a witness in the court.

17. The submission of learned APP that Shobha was not in a proper state of mind when she lodged the FIR and, therefore, these lapses have occurred, and cannot at all be accepted. It is

not that immediately after the rape Shobha had gone to lodge the report. The rape was committed between 2.30 p.m. and 3.30 p.m. ; she went by bus to her home; waited for her father at home; who accordingly came at 12 midnight; then she narrated the incident to him; and on the next day both of them had gone to advocate Desai; they consulted and talked with him about the entire incident and took instructions from him; then they went to lodge the report at 3.15 p.m. In the mean time Shobha was examined by the doctor where she gave the case history. This passage of time was sufficient for Shobha to over come mental trauma and to give clear and cogent report of the sexual assault.

18. Difference in two statements of Shobha, viz. the FIR and the supplementary statement, cannot at all be considered as minor. In the FIR she totally omitted the name of accused No.3. There is not even remote reference to him, whereas in the supplementary statement she not only brings him into picture but alleges that he was the first to commit rape followed by rape by Navnath and thereafter by Dattu. Therefore, this is a total somersault and making the prosecution

case topsy-turvy.

19. If at all in a broad day light Shobha was raped by three persons, all of them are known to her, and when a girl of 17 to 18 years is raped by three persons, then it is not a minor incident. The incident is bound to have serious consequences on her future life, on her mental and emotional condition. It is not an incident that the victim or raped girl will forget within 14 hours. And, therefore, if the rape is committed upon Shobha by all the three accused in broad day light in succession, then there are absolutely no reasons why Shobha should forget even to mention about the presence of accused No.3. This total diversion in the FIR and in the supplementary statement creates strong doubt about the integrity and character of Shobha as a witness of the prosecution. Her explanation given about this omission and change of sequence in the commission of rape given at the time of supplementary statement is not accepted at all.

20. In her cross examination she admitted that at the time of lodging the FIR (Exhibit 21) she did not disclose the name of accused No.3.

She also admitted that she was not knowing whether accused No.3 committed rape upon her or not and that she was not knowing the name of accused No.3 nor his physical appearance, name or address. She was confronted with the supplementary statement recorded on 12.6.1995. She could not assign any reason in support of the portion marked "A" i.e. about the rape by accused No.3 at the beginning and commission of rape by accused No.2 thereafter. I have already observed that the FIR and the supplementary statement create total different picture about which the Shobha has no explanation at all.

21. Second aspect that creates doubt about the story is that even if the prosecutrix is alleged to have been raped by three persons in succession as per the FIR or supplementary statement, there is not even a scratch upon her body nor any abrasion or contusion. There are no signs of rape whatsoever and nowhere it is noted by the doctor who examined her. In her cross examination Para 12 Shobha admitted that she was trying her level best to stand when she was pulled down on the ground by the accused persons;

she was resisting to avoid forcible sexual intercourse and also avoiding to see that both the accused should not get any chance to commit rape. She was doing and trying her level best to avoid the rape and she put her resistance for about 10 to 15 minutes. She was also raised hue and cry when she was sexually assaulted by the accused as above.

22. If what Shobha is stated is admitted as true then there ought to have been some signs of some sexual intercourse with her in the form of any scratch, nail abrasions either on her body or on the body of any accused. But the medical report as stated by me is totally silent. It is also almost entirely blank excepting the first page where the name of Shobha and other particulars are written. It is at Exhibit 16. So far as clothing are concerned, there was neither any damage nor any stain. So far as foreign body i.e. hair/fibro/grass/mud/dust etc. and loss of buttons, hooks etc. are concerned, the remarks in the medical certificate are "NAD". General Examination - NAD; Examination of finger nails of the victim for findings - NAD. So far as Local Examination is concerned, the local

hygions - good; Matting of pubic hair (To be preserved & sent to FSL); Any stain - NAD; Any foreign body - NAD; Any injury to be perineum - NAD; Libia Minora & Libia Majora - NAD; So far as vaginal canal and discharges are concerned the remarks are - NAD. No opinion was given by the doctor and the opinion reserved till reports from clinical analysis are available and, that this Dr.Kale was examined as P.W.19. She did not give any opinion. She was not found any sign of injuries on the private parts. But in her examination she has not stated as to whether Shobha was raped. Her evidence is of no use to the prosecution.

23. Consequent result of this discussion is that the testimony of Shobha cannot be relied upon in support of prosecution case in the absence of any corroboration. There are inherent lacunas, as discussed above, in her testimony.

24. However, the learned APP for the State pointed out that even if all the witnesses turned hostile, there is evidence of the prosecution to show that the accused had booked a room in Visawa

Guest House. That in itself is of no use to the prosecution. His further submission was that the clothes of the accused were seized by the police and the clothes of Shobha were also seized which were on their persons at the time of rape. Bed sheet from Visawa Guest House was also seized. And all of them were having blood stains or semen stains. The learned APP pointed out that the report of the CA strongly corroborated the testimony of Shobha. That report is at Exhibit 61. In all 25 Articles were sent to the CA as described in the said report. Articles 1 to 4 were of Shobha. Article 5 was the bed sheet seized from Visawa Guest House. On Articles 6, 7, 8 were Dhoti, full shirt and a cap, no blood stains detected. On Articles 9, 10 and 11 i.e Full shirt, payjama and Jangya, no blood stains were detected. On the Payjama there were blood stains appear to be wash but the blood group could not detected. Article 12 to 17 belong to prosecutrix. Article 12 was the blood stained cloth; Article 13 was blood in a phial; Article 14 blood in a phial; Article 15 was nail clippings; Article 16 was the pubic hair where no semen detected; Article 17 - presence of hair from Exhibit 21 of Accused No.2 was detected.

Blood group of Shobha is "A".

25. Blood group of accused Navnath Maske is "B"and that of Accused No.3 Kerba Gore is "A". No semen was detected on the pubic hair of accused Nos. 2 and 3. It will be clear that the bed sheet which is most damaging evidence for the accused was found to be contained blood group "A" and "B", but no semen was found. Blood group of Accused No.3 is "A" and that of Accused No.2 is "B".

26. From this evidence regarding finding of blood stains of accused Nos. 2 and 3 and presence of hair of accused No.2, as stated above, is, according to learned APP Mr.More, sufficient evidence to corroborate the testimony of Shobha.

27. I am not in agreement with this submission. This is a case of rape which means and indicates that it is a forcible sexual intercourse against the wishes of the victim girl. Her oral testimony is full of defects discussed by me above regarding the rape.

28. Mr.Hudlikar, appearing for Accused No.3, pointed out that the bed sheets used in the hotels like Visawa Guest House are always used frequently for the different customers without washing them too and different kinds of stains are there on the bed sheets and all the passengers and travellers who occupy such hotels are not very particular about getting a washed and clean bed sheet. Therefore, according to him, the conviction in such serious cases should not be based on such findings of the C.A. Though I am not in full agreement with the submissions made by Advocate Hudlikar but this evidence of the CA cannot be accepted in the background of the evidence of Shobha.

29. The learned APP tried to contend that Shobha had no reasons to falsely implicate all these accused. That is also altogether different aspect in the sense that if the substantive evidence is not forthcoming, if the evidence of the prosecutrix does not inspire confidence, then only because there is no reason for the

prosecutrix to falsely implicate, the conviction of the accused cannot be sustained for all the reasons stated above. Hence I pass the following order :-

: ORDER :

1. Both the appeals are allowed.

2. Conviction of Accused No.1 Dattatraya Pandharinath Gaikwad under Section 363 of the Indian Penal Code is set aside. Conviction of Accused No.2 Navnath Namdeo Maske and Accused No.3 Kerba Chandrabhan Gore under Section 376(2)(g) is set aside. So also their sentence.

3. Accused No.2 is in custody. He be set at liberty forthwith if not required in other case. Accused Nos. 1 and 3 are on bail. Their bail bonds shall stand cancelled.

4. If the accused paid the fine, the same should be returned to them.

5. Certified copy expedited.

6. Appeals are disposed of accordingly.

[D.G.DESHPANDE]

18/08/2004. Judge.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 694 OF 1999.

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Mr.Thorat, Sr. counsel, for Accused No.1.
Mr.D.R.More, APP, for the State.

CORAM : D.G.DESHPANDE,J.

DATED : 18th August 2004.

OPERATIVE ORDER

. For the reasons separately recorded, the following order is passed :-

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[D.G.DESHPANDE]

18/08/2004. Judge.